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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

EUGENE PRESTON BROWN

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 67-70) is reported at 175 F. 2d 273. The opinion of the District Court (R. 51-54) is reported at 81 F. Supp. 647.

JURISDICTION

The petitioner invoked Section 1254 (1).

Jurisdiction is absent because the Supreme Court has no jurisdiction in a habeas corpus case to review a judgment of a Court of Appeals that orders the discharge of a prisoner, or affirms an order of discharge granted by a District Court.

The authorities and argument are set forth in the argument in this brief.

STATEMENT OF THE CASE CONSISTING OF CORRECTIONS TO PETITIONER'S STATEMENT

Warden's brief, page 3:

The German girl was believed by Brown to be of good character and reputation. (R. 1, paragraph 8, R. 10, paragraphs 8, 9, 10.)

Warden's brief, page 3:

Prosecution witness Elisabeth Rehm testified that before Olschewski and Kowalsczyk left the guard box, they had an argument with Brown, apparently including a verbal threat (R. Vol. II, 68, lines 3-10, 17-20 and 38-41). She did not understand what was said in the argument. She did not state how it arose. She did not see the shot fired. The accused testified that the argument arose when they molested the girl (R. Vol. II, 81). According to her, they spoke to her in German, using an expression translated "Hello, Miss" (a phrase with a ring of familiarity). In German they used the phrase "Gruess Gott" (R. Vol. II, 31), which, to an American unfamiliar with German language, sounds the opposite of a respectful greeting.

The statement of the Warden's brief, page 3, that Olschewski and Kowalsczyk left the house is confusing. They walked to the door, and stopped (R. I, 82). In failing to move on they challenged the sentry's authority. The Warden's assertion that accused "followed" them to the door is confusing. It was after they had stopped and turned and remained that he went to the door (R. II, 82). In firing the shot, Brown intended to frighten deceased (R. II, 84). When Olschewski was asked in which direction the gun was pointed, up in the air, down at the floor, backwards, forwards, or what, he was not sure. But he did testify that Brown had the pistol in his hand in the direction between

Olschewski and Kowalsczyk, and he demonstrated by holding the pistol in his hand, extending his hand from the body parallel with the ground and extended directly forward (R. II, 60). The autopsy report (R. II, 36) showed that the course of the bullet was from just to the right of and below the tip of the scapula (shoulder blade) to the left upper quadrant of the abdomen (which would mean a course 30 degrees downward), showing that the deceased was lunging forward swinging at Brown. Brown was very small, 5 feet, 7½ inches tall, 39 years old, his weight with clothing 135 pounds (R. page 2, par. 12, R. 10, par. 12). Olschewski and Kowalsczyk were in their twenties and much larger (R. 47). The autopsy report was not introduced in evidence (R. II, 76). No one evaluated it correctly in the pretrial examination. The medical stipulation (R. II, 76) at the trial was far less favorable to the accused, when taken in connection with the testimony that the bullet entered the back of the shoulder (R. II, 74).

After the shot, Brown immediately sought a flashlight to help the wounded man (R. II, 35), and helped carry him in. (R. II, 70.) A single shot was fired. (R. II, 35.)

Olschewski was impeached by proof that he made a contradictory statement of importance in his written statement after the incident. His explanation that the written statement was garbled was in no way confirmed by any evidence (R. II, 62).

Warden's brief 3:

The statement that the first paragraph on page 3 of Warden's brief is uncontradicted is denied. The facts set forth above in this brief are to the contrary.

Warden's brief 3:

On 27 December 1946 the company commander recommended to his battalion commander a trial upon a charge

of manslaughter (R. II, 30). To this recommendation he attached the autopsy report and brief statements from witnesses. Who took them is not shown. The statement in German by the principal witness, Olschewski, was incorrectly recorded, according to Olschewski (R. II, 62). The method of abbreviating the date is European, 7.12.1914 (R. II, 34), hence the interviewer must not have been American.

After the company commander recommended trial as above stated, by a first endorsement the battalion commander appointed an investigating officer (R. II, 29). The investigation consisted merely of an interview with accused (R. II, 27, 28). The investigating officer did not tell the accused of his right to interview witnesses against him (R. 41). Accused was not at that time represented by counsel (R. 40). The investigation report was erroneously prepared, containing inconsistent paragraphs 2 and 3 thereof (R. II, 27). By a second endorsement, this report was transmitted to battalion headquarters (R. II, 29). Recommendation was trial by general court-martial. Murder was not mentioned.

On Saturday, 28 December, the group commander similarly recommended general court-martial, not mentioning murder. On Monday, 30 December, at Headquarters of the Continental Base Section over 100 miles away, the charge and specification of manslaughter was marked out with pen and ink, and these changes bore the initials "R.E.B." The marked out specification appears to have been unintentionally omitted from page 21 of Volume II of the Record. It reads:

"REB

Charge 1: Violation of the 93 Article of War.

REB

Specification: In that Technician Fifth Grade Eugene P. Brown, 994th Ordinance HAM Company, did, at Feuerbach, Germany, on or about 25 December 1946 willfully, feloniously, and unlawfully kill Josef Kowalsczyk, a Polish Civilian, by shooting him in the right shoulder with a .45 Caliber Pistol.

REB

Charge: Violation of the 92nd Article of War.

REB

Specifications: In that Technician Fifth Grade Eugene P. Brown, 994th Ordinance HAM Company, did, at Fuerbach, Germany, on or about 25 December 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Josef Kowalsczyk, a human being, by shooting him with a pistol."

This occurrence was admitted in the Warden's return (R. 1, par. 26; R. 11, par. 26). Also pages 42 and 43 of Warden's brief need to be corrected in this particular.)

Captain Robert E. Byrne, JAGD, on that day at Continental Base Section Headquarters swore to a new charge of violation of Article of War 92 and a new specification of murder, taking oath that he had investigated. Accused never heard of any such investigation (R. 45). Presumably Captain Byrne referred to a reading of the papers as an investigation. No additional investigation occurred thereafter (R. 3, 4, 5, paragraphs 18-28, 30, R. 10, 11, 12, paragraphs 18-28, 30). The oath of Captain Byrne was taken before Captain Gerald A. Sams, JAGD (R. II, 22), who performed no other function in the case (R. 45), but who signed as Assistant Trial Judge Advocate, C.B.S.

The pretrial investigation that was previously conducted was a travesty. The errors are listed in paragraphs 31 to

49 of the habeas corpus petition appearing on pages 5 and 6 of the Record, and subsequently in this brief.

Brown had only attended high school one year. (R. 49.)

Warden's brief, page 4:

Neither of the two assistant defense counsel participated, nor did assistant trial judge advocate, Captain Jack H. Chalkley, Judge Advocate General's Department, participate.

Warden's brief, page 4, footnote 1:

Long before the question of the law member was added by amendment, the habeas corpus petition in paragraph 52C (R. 6) alleged, "Two able lawyers, members of the Judge Advocate General's Department, represented the prosecution." This referred to Captain Kane of the Medical Administrative Corps and Captain Royston of the Adjutant General's Department. The error was discovered when the Warden's return was filed (R. 13, paragraph 52C). The error was immediately corrected (R. 16, paragraph 1 (a)). That was over two weeks before the trial in the District Court. That error has not been repeated.

Before the Court of Appeals, Brown's reply brief contained this statement:

> "In addition to Captain Chalkley, (JAGD), there was also available Captain Gerald A. Sams, (JAGD), who witnessed a paper at Headquarters on the very day when this case was referred to the court-martial."

Oral argument for Brown before the Court of Appeals was to the same effect as the reply brief.

The Court of Appeals must have been interested principally in the important facts that Captain Sams was an officer of the Judge Advocate General's Department and was available to be law member, and only secondarily in

whether he was appointed assistant trial judge advocate. Indeed, he signed his name in witnessing the paper above the following typing:

"GERALD A. SAMS
Captain, JAGD, Asst. Trial Judge Advocate, CBS"

The difference between this title and the reference to him in the opinion is "CBS" and the fact that the opinion refers to an appointment of him as assistant trial judge advocate as being in the order appointing the court-martial. In fact the signature of Captain Sams immediately proceeds the order referring the case to this general court-martial for trial, and since that order is a "first indorsement," it may be that Captain Sams in fact is included in the four corners of the order, if the order incorporates by indorsement the specification of murder.

Whether the Court of Appeals meant Captain Sams or anyone else, the Supreme Court may properly decide that Captain Sams was available to be law member.

Warden's brief, page 4:

Captain Chalkley was excused not from serving as law member but as assistant trial judge advocate. The selection of law member had occurred December 7 (R. II, 53). The order of reference for trial was issued 30 December (R. II, 3). Trial occurred January 7 and 14 (R. II, 54, 91.)

Warden's brief, page 5:

The "introduction" of defense counsel to the court by the accused was a printed recital in the form. Counsel was no doubt far better known to the court than accused.

Warden's brief, page 5:

Olschewski and Kowalsczyk "left" only in that they walked to the door. There they stopped, turned around

and stood fast. This was a disobedience of the order to "raus" (get out) and was a defiant attitude toward a sentry. They should have moved on. When they did not, Brown located a pistol and went to the door (R. II, 82). He could not countenance defiance at his post.

Warden's brief, page 6:

Olschewski in his pretrial statement in German is quoted with the direct quotation in English of what he said just before the shot was fired: "Boy is OK" (R. II, 34). The translation of the statement from German into English should of course have carried this direct quotation verbatim. Instead, it was changed to "It is OK boy" (R. II, 33). The first version was an apology for the misconduct of the "boy," Kowalsczyk. The second version was purported submission to the order to leave. Kowalsczyk was a boy in his twenties. Accused was a middle-aged man, 39, and a non-commissioned officer. This change in this res gestae statement gave it just the opposite significance. This change was not noticed in the pretrial investigation, or by defense counsel. It was never mentioned to the court. It was not noticed in any review. While the testimony of Olschewski at the trial followed the second version, he was not questioned about the first version. Such a mistake in a statement of a witness can easily, without any intention on the part of the witness or the attorney, result in mistaken testimony. Memory of conversation is notoriously unreliable. First impression is best.

Warden's brief, page 6:

Elisabeth Rehm testified to an agreement preceding the shooting (R. II, 68, lines 3-10, 17-20 and 38-41).

Warden's brief, page 8:

The prisoner also alleged (1) Due process was denied, in various particulars. (2) There was no scintilla of evi-

dence of malice or premeditation. (3) Reviews were insufficient to comply with the indispensable requirements of the statute. (4) No evidence of murder. Insufficient evidence of manslaughter. (R. I, 7-8, 17-18, 22-23.)

Warden's brief, page 9:

The Court of Appeals found that the record evidence established that two officers of the Judge Advocate General's Department were available for appointment as law member. It held, as did the District Court, that the burden of proof in regard to availability was upon the Warden (R. 53, 68).

Warden's brief, page 9:

The Court of Appeals found the court-martial record replete with highly prejudicial errors and irregularities denying due process. The six listed were only a few of those found (R. 70). Their effect was also cumulative.

CORRECTIONS TO VOLUME II OF RECORD

The correction on page 21 is above stated.

The exhibit that is a Manual of Interior Guard Duty is on file with the Clerk of the Supreme Court.

The extract copy of Guard Report for 25 and 26 December 1946 is an accurate printing of the copy in the record, but the record copy should have been the extract for the evening hours instead of for the morning hours.

SUMMARY OF ARGUMENT

I. The Supreme Court's jurisdiction to review a decision of a Court of Appeals granting a discharge of a prisoner exists only by statute. Section 2253 of Title 28 of the New Judicial Code provides for appeal only as far as the Court of Appeals. Reviser's notes confirm this view. Old section 463 (c) is not carried over. New section 1254 is general

and does not include habeas corpus. Reason supports this view: A discharged prisoner cannot afford repeated appeals for government convenience.

II. A court-martial is a tribunal of special and limited jurisdiction. Its sentences are subject to collateral attack. No presumption or inference exists in favor of such a sentence. Every jurisdictional fact must be established by the Warden. The most important member, the law member, must be an officer of the Judge Advocate General's Department, except when such an officer is not available. The burden of proof of availability is on the Warden. He offered no proof. The accused proved by the record itself that two Judge Advocate General's Department Officers were available. The court-martial sentence was void.

There was no evidence that the appointing authority made any determination in regard to availability. In fact he made no determination whatever on the subject.

The statutory exception in regard to availability has been magnified by administrative interpretation to the point of absurdity, amounting to nullification of the requirement that the law member shall be an officer of the Judge Advocate General's Department. Aside from that, the question of availability was not even considered by the appointing authority in this court-martial. Jurisdiction cannot be conferred by consent or waiver. Nor was there any consent or waiver here.

Nothing in the legislative history of the 8th Article of War suggests any different view.

III. Due process of law was denied. Therefore the sentence is void. The violations are flagrant and too numerous to list in this summary.

IV. A soldier is entitled to the right of counsel under the Fifth Amendment. This right was not substantially

accorded. The particulars are serious, and are too numerous for listing in this summary.

V. A three-fourths vote is necessary to convict for murder. The minimum sentence for murder is life imprisonment. Conviction automatically carries at least a life sentence. Such a sentence cannot be imposed with less than a three-fourths vote. This is the true meaning of the statute.

ADDITIONAL REASONS URGED

In addition to the reasons given by the Court of Appeals, the following reasons will be urged in support of the order:

1. Conviction for murder requires three-fourths vote, not mere two-thirds.

2. Constitutional right to counsel not substantially complied with. (Partially a duplication of the ground of denial of due process.)

I

THE SUPREME COURT HAS NO JURISDICTION TO REVIEW A JUDGMENT OF THE COURT OF APPEALS THAT ORDERS THE DISCHARGE OF A PRISONER, OR AFFIRMS AN ORDER OF DISCHARGE GRANTED BY THE DISTRICT COURT.

In the absence of statute, the custodian cannot appeal an order of discharge.

Cox v. *Hakes*, (1890) L.R. 15 App. Cas. 506.
Sec'y of State v. *O.B.*, (1923) A.C. (Eng.) 603.
State v. *Towery*, 143 Ala. 48 (1904).
Re Zany, 164 Calif. 724 (1913).
Gagnet v. *Reese*, 20 Fla. 438 (1884).
Hammond v. *People*, 32 Ill. 446 (1863).
Wallace v. *Cleary*, 5 Ill. App. 384 (1879).
Magerstadt v. *People*, 105 Ill. App. 316 (1902).

Skinner v. *Sedgbeer*, 8 Kan. App. 624 (1899).
Re Coston, 23 *Md.* 271 (1865).
People v. *Covant*, 59 Mich. 565 (1886).
People v. *Fairman*, 59 Mich. 568 (1886).
Ex Parte Jilz, 64 Mo. 205 (1876).
Re Whicker, 187 Mo. App. 96 (1915).
See *State* v. *Simmons*, 112 Mo. App. 535 (1905).
Notestine v. *Rogers*, 18 N.M. 462 (1914).
Re Williams, 149 N.C. 436 (1908).
Re Barber, 56 Vt. (1884).
Carper v. *Fitzgerald*, 121 U.S. 87 (1887).
In re Neagle, 135 U.S. 1 (1890).
Cross v. *Burke*, 146 U.S. 82 (1892).
In re Schneider, 148 U.S. 157 (1893).
In re Lennon, 150 U.S. 393 (1893).
McKnight v. *James*, 155 U.S. 685 (1895).
Lambert v. *Barrett*, 157 U.S. 697 (1895).
Chin Fong v. *Backus*, 241 U.S. 1 (1916).
Horn v. *Mitchell*, 243 U.S. 247 (1917).
Pothier v. *Redman*, 261 U.S. 307 (1923).
See *Craig* v. *Hecht*, 263 U.S. 255 (1923).
United States v. *Singer*, 5 Fed. 2d 966 (CCA 3-1925).

Section 463 (c) of the Old Title 28 provides:

"Sections 346 and 347 of this title applicable. Sections 346 and 347 of this title shall apply to habeas corpus cases in the circuit courts of appeals and in the Court of Appeals of the District of Columbia as to other cases therein."

Section 347 (a) of the Old Title 28 provided:

"In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme

Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Section 2253 of the New Title 28 provides:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such order in a proceeding to test the validity of a warrant of removal issued pursuant to section 3041 of Title 18 or the detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

Section 2253 is the particular section referring to habeas corpus.

Section 1254(1) of the New Title 28 provides:

"Court of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The Reviser's Notes with reference to 2253 do not purport to include 463 (c) of Old Title 28.

The Reviser's Notes with reference to 1254 do not purport to include 463 (c) of Old Title 28.

The appellate jurisdiction of the Supreme Court in cases where discharge has been affirmed by a Court of Appeals rests exclusively in 463 (c) of Old Title 28. The omission of 463 (c) of Old Title 28 removes the sole basis of jurisdiction.

General statutes relating to appeal do not include habeas corpus.

Notestine v. *Rogers, supra.*
Gagnet v. *Reese, supra.*
Ex parte Zany, supra.

In *Cox* v. *Hakes, supra,* the statute was S.19 of the Supreme Court of Judicature Act, 1873:

> "The Court of Appeals shall have jurisdiction and power to hear and determine appeals from any judgment, or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice."

In *Secretary of State* v. *O'Brien, supra,* the statute was S.3 of the Appellate Jurisdiction Act, 1876:

> "Subject as in this Act mentioned an appeal shall be to the House of Lords from any order or judgment of any of the Courts following; that is to say, (1) Of her Majesty's Court of Appeal in England.

In each case the House of Lords held that a statute of general application in regard to appellate jurisdiction does not include habeas corpus. A holding to the same effect would dispose of the present case.

An additional point is presented. Lord Herschell, in *Cox* v. *Hakes,* stated:

> "If the contention of the respondent is to prevail, that statute has effected a grave constitutional change."

In *Secretary of State* v. *O'Brien*, Lord Shaw of Dumferline stated:

> "There is hardly any great historical occasion on which a Government might not plead its view of the public good and the public convenience as an excuse for a violent deprivation from the subject of those rights in which he is secured by law. In declining jurisdiction in this case, your Lordships are not doing more than affirming a settled principle and declining to permit an invasion of constitutional right."

The essential nature of habeas corpus is thus protected against infringement by expensive appeals.

Constitution of the United States, Art. I, Section 9:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

The financial burden upon a person wrongfully imprisoned becomes oppressive if he must run the procedural gauntlet to the highest court and become a guinea pig for the convenience of other prisoners and the departments of government. The orthodox British and American rule is sound. It follows that the subject-matter is beyond the jurisdiction of the court and the assignments of error cannot be considered.

II

COURT-MARTIAL NOT CONSTITUTED AS REQUIRED BY LAW

(A) COLLATERAL ATTACK ON THE JUDGMENT OF A COURT-MARTIAL.

A court-martial is not a court of record, nor a court of general jurisdiction. Its jurisdiction is special and limited. Its judgments are subject to collateral attack.

Ex parte Watkins, 3 Peters 193 (1830).

Collins v. *McDonald*, 258 U.S. 416 (1922).
Givens v. *Zerbst*, 255 U.S. 11 (1921).
Runkle v. *U.S.*, 122 U.S., 543 (1887).
McClaughry v. *Deming*, 186 U.S. 49 (1902).
Humphrey v. *Smith*, 336 U.S. 695 (1949).

The quotations from four of these cases are in the opinion of the District Court which appears on pages 52 and 53 of Volume I, Transcript of Record.

In *Humphrey* v. *Smith*, 336 U.S. 695 (1949) *supra*, the court said:

> "It is contended that the court-martial was without jurisdiction to try respondent. If so the court-martial exceeded its lawful authority and can be invalidated despite the limited powers of a court in habeas corpus proceedings."

(B) BURDEN OF PROOF UPON THE WARDEN.

The burden of proof is upon the Warden to establish that the court-martial was legally constituted, that it had jurisdiction, and that all the statutory requirements governing its proceedings were complied with.

McClaughry v. *Deming*, 186 U.S. 49, 62, 63 (1902).
Runkle v. *U.S.*, 122 U.S. 543, 555 (1887).
Givens v. *Zerbst*, 255 U.S. 11, 19 (1921).

In *Van Mehren* v. *Sirmyer*, 36 Fed. 2d 876, 880 (1929), the court held:

> "The burden is upon the party asserting the validity of the judgment of the court-martial to prove the existence of the necessary jurisdictional facts."

(C) NO PRESUMPTION OR INFERENCE IN FAVOR OF JUDGMENT OR SENTENCE OF A COURT-MARTIAL.

In *Schita* v. *King*, 133 Fed. 2d 283, 287 (CCA 8-1943), the court stated:

> "The judgment did not carry with it the presumptions of legality and validity which protect the judgment of a civil court of general jurisdiction against collateral attack."

In *McClaughry* v. *Deming*, 186 U.S. 49 (1902), at page 63:

> "There are no presumptions in its favor, so far as these matters are concerned. . . . The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively, and it is not enough that they may be inferred argumentatively."

In *Runkle* v. *U.S.*, 128 U.S. 543, at page 556:

> "There are no presumptions in its favor so far as these matters are concerned. . . . The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively."

THE COURT-MARTIAL WAS NOT CONSTITUTED AS REQUIRED BY LAW. THE MOST IMPORTANT MEMBER, THE LAW MEMBER, WAS NOT AN OFFICER OF THE JAGD. NO OFFICER OF THE JAGD WAS ON THE COURT.

At the time of this court-martial, the 8th Article of War (10 USCA 1479) provided:

> "The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer

> of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe." (Act of June 4, 1920, Chapter 227.)

This provision was enacted in 1920 as a reform measure resulting from experience of World War I.

For legal purposes, the law member is the most important member of a court-martial.

The law member corresponds to a judge trying a jury case, with the additional power of going to the jury room. If the law member is not a lawyer, the court-martial resembles a trial by blue ribbon jury without a judge. In civil cases, such a trial is void.

In military law, the same is true. The Manual for Courts-Martial (1949) states (page 3):

> "Failure to appoint a law member of a general court-martial who is qualified as prescribed in Article 8 renders any proceeding of such a court void."

Congress in its wisdom provided that the Judge Advocate General's Department shall bear the important responsibilities of law members of general courts-martial, in order that the men who are giving at least the best years of their lives to the nation will have the best in military justice and discipline.

The selection of judges is of the greatest importance in the administration of justice. The quality of the judiciary largely determines the effectiveness of the system.

With a qualified law member, a court-martial compares favorably with a typical civilian judge or jury, resembling in effect a blue ribbon judge and blue ribbon jury. Without a qualified law member, a general court-martial is

easily lost in the intricacies of law and criminal investigation. The qualified law member is the keystone of a sound court-martial system.

Congress in 1920 by this reform measure in the 8th Article of War undertook to establish a method for the selection of judges for the administration of military justice and discipline. Congress introduced system in place of confusion. The Judge Advocate General's Department was to constitute the judiciary of the Army general courts-martial. The law member was required to be a member of the Judge Advocate General's Department, with a single exception that will be discussed later in this brief. The Judge Advocate General's Department would determine in advance the uniform standards for the officers who would be members of that Department and thus eligible to serve in the judiciary of the Army as law members of general courts-martial. The selection of those eligible to be law members would be uniform and systematic, centralized in Washington, with the effectiveness that good personal administration can accomplish. The haphazard selection of law members from whatever officers happened to be in a particular command, some of whom might have had legal training or experience of one kind or another, was to be dispensed with. It was outmoded. On-the-spot selections at far-flung commands all over the world were gone with the wind of the horse and buggy days.

THE EXCEPTION IN THE STATUTE

The 8th Article of War contains an exception:

> ". . . except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member."

The purpose of the exception is obvious. In battle emergencies, either casualties or illness among the officers of the Judge Advocate General's Department could prevent the holding of courts-martial if the presence of an officer of that department were an indispensable requirement.

But Congress did not intend that at the Headquarters of all the forces in Europe, nineteen months after the cessation of hostilities, a general court-martial should sit for six weeks trying among other cases capital felony charges without an officer of the Judge Advocate General's Department as law member. That would be NULLIFICATION of the reforms of the 1920 legislation.

THE STATUTORY EXCEPTION: ADMINISTRATIVE INTERPRETATION

Since the decision of the Court of Appeals in this case, it has come to light that the exception in the 8th Article of War has been given an interpretation that makes it refer to practically every general court-martial. Its growth has been like a cancer, distorting out of all proportion, and killing the reforms of the 8th Article of War.

In the Canal Zone, in a period of 32 months, not one law member was an officer of the JAGD.

Fugate v. *Hiatt*, 86 Federal Supp. 22 (7/15/49).

In the Philippines, in five months in 1945 under war conditions, with 15 officers of the JAGD stationed in the command, not once in 500 general courts-martial was the law member an officer of the JAGD.

Sinclair v. *Hiatt*, H.C. No. 2433 in the Northern District of Georgia, September, 1949.

On page 32 of the Warden's brief, note 12, it is stated that if the accused prevails, there must be a wholesale release of convicted Army personnel from confinement.

This confirms the conclusion that rarely was a law member an officer of the JAGD in the years prior to 1948.

The administrative interpretation of the statutory exception in regard to availability reached this absurd result. An officer of the JAGD was virtually never available, for he was always "busy with other things." Often he served as prosecuting attorney.

The rule that administrative rulings shall be given great weight must be abrogated when an administrative ruling becomes a NULLIFICATION of the laws of Congress.

Underlying this weird practice in regard to law members is a simple explanation—the hesitance of high military personnel to accept the leadership of an officer of lesser rank in regard to affairs within the scope of his professional knowledge and skill. A general on the sick list finds it difficult to take orders from a captain in the Medical Corps. A colonel or a major dislikes to defer to a law member who is a captain. This view of the profession of arms is traditional and understandable, but it must give way to the orders of Congress. In the last analysis, this case presents the fundamental issue of whether the professional soldier can shuffle off the control of Congress over the military establishment. Fundamental in the Constitution and the traditional government of the United States is the principle that the war power is vested in Congress. Congress enacts the Articles of War. Generals are bound to observe and respect the Articles of War, not to pursue the policy of NULLIFICATION. The power to legislate has not been conferred upon the Judge Advocate General.

If this administrative ruling by the Judge Advocate General is to be adopted, it opens the flood gates and says, any administrative ruling, however bizarre, will be swallowed by the judiciary.

The argument that this administrative interpretation is to be given great weight is demolished by reason of the fact that Congress overruled that interpretation when it came to public attention in World War II.

On June 24, 1948, the Selective Service Act Amendment, to be effective in this respect February 1, 1949, provided:

> "The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail: Provided, That no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The law member, in addition to his duties as a member, shall perform the duties prescribed in Article 31 hereof and such other duties as the President may by regulations prescribe."

The rule that administrative interpretations are entitled to great weight should be subject to another caveat. Whenever the ruling of the administrative body adds to its power, or relaxes legislative controls upon its functioning, then the merits ought to be examined impartially.

The administrative interpretation of availability should therefore be considered with caution. Congress has rejected it. It is wrong. It does not deserve judicial adherence. NULLIFICATION is out of the question.

If it be urged that the number of prisoners affected is large, the answer is that if their cases resemble this, the number of innocent men, American soldiers, unjustly buried alive in prison is a consideration of great significance. Guilty murderers can be tried again.

(A) THE STATUTORY EXCEPTION: BURDEN OF PROOF.

The burden of proof in case of a statutory exception is upon the party relying upon it. The District Court and Court of Appeals so held in this case. In the case of *Walling* v. *Reid*, 139 Fed. 2d 323 (CCA 8-1943), the court said:

> "One claiming the benefit of an exemption from a statute of general application has the burden of bringing himself clearly within it."

In *Vondermuhl* v. *Helvering*, 75 Fed. 2d 656 (CA DC 1943), the court said.

> "One claiming the benefit of a statutory exception must bring himself explicitly within it."

In *Canadian Pacific Railway Co.* v. *U.S.*, 73 Fed. 2d 831, 834 (CCA 9-1934), the court said:

> "A proviso or exception which restricts the general scope of the act must be strictly construed, and will not be permitted to take any case out of the enacting clause which does not clearly fall within its terms, and the burden of proof is on one claiming the benefit of the proviso."

In *U.S.* v. *Union Pacific R. R. Co.*, 20 Fed. Supp. 665, 667 (DC Idaho 1937), the court said:

> "An exception in a statute is to be strictly construed and any one who claims to be relieved from its operation is required to establish that he comes within the words of the exception."

Ryan v. *Carter*, 93 U.S. 78, 83 (1876).

Thomas E. Basham Co. v. *Lucas*, 21 Fed. 2d 550 (Ky. D. C. 1927).

PROOF IN THIS CASE

The Warden introduced no evidence at the hearing (R. 50, 53). The Record of Trial by Court-Martial contains no mention of any reason why the law member was not selected from the Judge Advocate General's Department, no mention of any notice or attention paid to the requirements of the 8th Article of War, no indication that there was any attempt to exercise any discretion.

NO PRESUMPTION OF THE MAKING OF A DETERMINATION IN REGARD TO AVAILABILITY

The Warden contends that there is a presumption that the appointing authority exercised his discretion and decided that there was no officer of the Judge Advocate General's Department available and that for that reason he did not name one to the place.

The cases cited in the introduction to this point establish the principle that no such presumption exists, nor any inference.

Furthermore, a presumption must have a basis in probability, in factual likelihood. The facts above stated on pages 20 and 21 of this brief establish that there is no factual basis for such a presumption.

Indeed, the Warden contends that the mere fact that a court-martial had been appointed was itself irrebuttable proof that the appointing authority duly considered the question whether an officer of the Judge Advocate General's Department was available. If such a rule were adopted, it would be in effect a ruling that anything goes —that because a person doing an act is in an administrative position, he never errs and it can never be shown that he committed a human error of omission or commission.

Nothing in the 8th Article of War gives countenance to such a theory. On the contrary, it places limits on the appointing authority and does not give him a blank check signed by Congress.

Unless the 8th Article of War is enforced in this clear case, it becomes a dead letter by judicial veto.

NO EVIDENCE OF THE MAKING OF ANY DETERMINATION IN REGARD TO AVAILABILITY

The Warden offered no evidence.

The record contained no recital of the making of any determination in regard to availability, or that the question was ever considered, or that any discretion was exercised on the subject.

On the contrary, the record shows two Judge Advocate General Department Officers available, Captain Chalkley and Captain Sams. Captain Chalkley served as assistant trial judge advocate of this very court. That establishes that he was available. Captain Sams was at Continental Base Section Headquarters on the day of the order of reference for trial, in the command as assistant trial judge advocate.

OLD PRECEDENTS CITED BY WARDEN ARE TRIVIAL

In *Martin* v. *Mott*, 12 Wheat 19 (1827), and *Bishop* v. *United States*, 197 U.S. 334 (1905), the jurisdictional minimum membership was five, and was satisfied. The use of thirteen members upon a court-martial was not intended to be a jurisdictional requirement but merely discretionary. That is the obvious meaning of the language used in the statute there applicable. The mere point of numbers is of trivial importance in comparison with the significance of the qualifications of the principal member, the law mem-

ber. Nor was the statutory provision in the form of a statutory exception that would shift the burden of proof to the party claiming the benefit of the exception.

In *Mullan* v. *United States*, 140 U.S. 240 (1891), the issue was insufficient rank of members of the court-martial. The matter was trivial in comparison with the question of the qualifications of the most important member, the law member. Furthermore, the fleet was at Hong Kong and the officers were in Washington. Nor was there a statutory exception involved.

In *Swaim* v. *United States*, 165 U.S. 553 (1897), the question was again the trivial one of comparative rank. Nor was a statutory exception involved.

The cases of *Martin* v. *Mott*, *supra*, and *Mullan* v. *United States*, *supra*, were decided before the right to collateral attack upon sentences of courts-martial had become firmly established.

No prejudice whatever resulted in any of those four cases. In the present case, the contrary is true.

That these four old cases cited by the Warden, and the more recent case of *Kahn* v. *Anderson*, 255 U.S. 1 (1921), do not apply, is the position now taken in the new Manual for Courts-Martial (1949), Section 4(e) on page 3:

> "Failure to appoint a law member of a general Court-Martial who is qualified as proscribed in Article 8 renders any proceeding of such court void."

CONCERNING HENRY v. *HODGES*, 171 Fed. 2d 401 (CCA 2-1948).

This is the time to beware of "the power of a great name to perpetuate error." Judge Learned Hand wrote the unfortunate opinion, enlarging upon the meaning of "available," beyond its normal meaning.

The court overlooked the essential meaning of the plan established by Congress. Furthermore, it apparently did not have the information that the word "available" has been overworked to the point that an officer of the Judge Advocate General's Department is almost never "available." Judge Hand would not countenance such evasion. He would not allow an exception in the statute to grow in the manner of a cancer and distort the normal meaning of the exception.

In *Henry* v. *Hodges* the opinion points out the lack of evidence of availability in that case. In the present case, Captain Sams was available. (R. II, 22). He was not used in any capacity in the case, except to attest an oath. Captain Chalkley was also available (R. II, 53).

PREJUDICE SHOWN FROM LACK OF JAGD OFFICER AS LAW MEMBER

This is no technicality. Without a member of the Judge Advocate General's Department on the court-martial, it resembled a jury trial without a judge present.

A trained lawyer with professional experience was needed to sift and weigh the evidence, particularly to evaluate the autopsy and the res gestae statement and the prosecutor's failure to account for the bottle. This court-martial involved points of law that apparently were not considered: the justification of a sentry's duty, the rejection of the obsolete doctrine of "retreat to the wall," the significance of provocation that was adequate to limit the offense to manslaughter, even if it were not a complete justification.

Surely a trained lawyer would have noticed the statement of the sole eye-witness, Sergeant Olschewski, that it all happened so fast that he did not have time to notice whether or not Brown's breath had the odor of alcohol

(R. II, 61), and the uncontradicted testimony of Brown that he went for a flashlight, for it was dark where the wounded man lay, (R. II, 85), and the testimony of Stone that he and the accused carried the wounded man to his barracks (R. II, 70). Immediate aid to the injured is not normally rendered by a murderer.

The failure to have an officer of the Judge Advocate General's Department on the court-martial was probably a reason for the total breakdown of justice in this case.

JURISDICTION CANNOT BE CONFERRED BY CONSENT UPON A VOID COURT

The law member is the most important member of a court-martial. He has an importance corresponding to that of a judge presiding over a jury.

The qualification of the law member is not one to be waived. In *McClaughry v. Deming*, 186 U.S. 49 (1902) the court held:

> "But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. His consent had no effect whatever in the face of the statute which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defend-

ant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial."

NO WAIVER OR CONSENT IN THIS CASE

The accused did not have knowledge that the law member was not an officer of the JAGD (R. 49). Without knowledge, he could not waive the disqualification.

Johnson v. *Zerbst*, 3040 S458 (1938):

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Gibbs v. *Burke*, 337 U.S. 773 (1949).

Uveges v. *Pennsylvania*, 335 U.S. 437 (1948).

An additional reason: the accused would not have been permitted to prove availability, according to page 29 of the Warden's brief.

LEGISLATIVE HISTORY

The Warden argues that knowledge of the cases of *Martin* v. *Mott*, 12 Wheat. 19 (1827), *Mullan* v. *U.S.*, 140 U.S. 240 (1891), *Swaim* v. *United States*, 165 U.S. 553 (1897) and *Bishop* v. *United States*, 197 U.S. 334 (1905), indicates that in 1920 Congress did not consider a defect in the constitution of a court-martial to be one of jurisdiction. Those cases were on trivial points altogether different from the qualification of the law member. Congress probably never thought of them in the same connection. The Manual for Courts-Martial (1949) considers them immaterial (page 3 of Manual).

The argument on page 21 of the Warden's brief concerning a proposed Act of 1920 falls flat and proves noth-

ing. The same is true of the reference on page 22 to the phrase "for the purpose."

His argument on pages 23 and 24 about a proposed phrase "reasonably available" is weak and flat because it referred to a proposed provision for a defendant who enjoys specjal constitutional and statutory protection.

His argument on pages 25, 26 and 27 about the recent amendment of AW 8 is unconvincing and gives the opposite of the sound interpretation. The truth is that the practices followed pursuant to administrative interpretation were so shocking that Congress overruled the administrative error. NULLIFICATION of the 8th AW had never been intended by Congress.

His argument on pages 20 and 30 that a law member need not attend court-martial trials was overruled by Congress. Furthermore, there is a difference between absence and disqualification. A disqualified law member is worse than none. A disqualified law member may unintentionally confuse and mislead the other members of the court.

His brief on page 31 repeats an error appearing over and over again in his brief, his assertion that the appointive authority determined that no officer of the JAGD was available. Not one scintilla of evidence, not one entry in the court-martial record gives any indication that there was any such determination. Everything indicates that there was no such determination. The District Court found as a fact that there was no such determination. Unless plainly wrong, the finding of the District Court upon this fact must be affirmed.

The fact that there was no such determination appears on the face of the very order appointing the court. It also appears on the amended specification, an indispensable part of the record, as an indispensible part of that specification.

The single function of JAGD officers that Congress provided that they must perform is that of law members of a general court-martial. To give to "availability" the interpretation that has been given by the Warden's brief is to flout the positive order of Congress.

The Warden's brief on page 33 overlooks the principle that the burden of proof in regard to availability is on the Warden. It was not carried. He offered no evidence.

In *United States* v. *Cooke*, 336 U.S. 210 (1949):

> "We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's armed services."

III

DUE PROCESS

The Fifth Amendment provides:

> ". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law . . ."

The Army Board of Review has held that the Fifth Amendment applies to Army Courts-Martial. See *Wade* v. *Hunter*, 72 Fed. Supp. 755 (1947).

Rear Admiral Colclough, when Judge Advocate General of the Navy, stated, "all the Amendments are applicable to persons in the land and naval forces, except so much of the Fifth and Sixth Amendments as relate to presentment or indictment of a grand jury and to trial by jury."

38 Journal of Criminal Law 200 (1947).
See *Wade* v. *Hunter*, 336 U.S. 684 (1949).
Grafton v. *United States*, 206 U.S. 333 (1907).

Beets v. *Hunter*, 75 Fed. Supp. 825 (1946).

Sanford v. *Robbins*, 115 Fed. 2d 435 (CCA 5-1940) cert. den. 312 U.S. 697.

Schita v. *King*, 133 Fed. 2d 283 (CCA 8-1943).

U.S. v. *Hiatt*, 141 Fed. 2d 664 (CCA 3-1944).

Hicks v. *Hiatt*, 64 Fed. Supp. 238 (1946, per Biggs, J.).

Shapiro v. *U.S.*, 69 Fed. Supp. 205 (Claims 1947).

See *Wrublewski* v. *McInerney*, 166 Fed. 2d 243 (CCA 9-1948).

See *33 Virginia L. Rev.* 269 (Hon. Kenneth C. Royall).

Any intimation to the contrary in the Warden's brief, page 13, lines 3-5, is totally unauthorized.

Numerous authorities hold that habeas corpus is available when due process has been denied.

Ex parte Lange, 18 Wall. 163 (1873—double jeopardy).

In re Snow, 120 U.S. 274 (1887—double jeopardy).

In re Nielson, 131 U.S. 176 (1889—double jeopardy).

Counselman v. *Hitchcock*, 142 U.S. 547 (1892—self-incrimination).

Ex parte Wilson, 114 U.S. 417 (1885—requirement of indictment).

Ex parte Bain, 121 U. S. 1 (1887—requirement of indictment).

Callan v. *Wilson*, 127 U.S. 540 (1888—jury trial).

See *Frank* v. *Mangum*, 237 U.S. 309 (1915—due process).

Johnson v. *Zerbst*, 304 U.S. 458 (1938—right to counsel).

Smith v. *O'Grady*, 312 U.S. 329 (1942 — due process).

Williams v. *Kaiser*, 323 U.S. 471 (1945—due process).

Rice v. *Olsen*, 324 U.S. 271 (1945—due process).

Wade v. *Mayo*, 334 U.S. 672 (1948—due process).

Townsend v. *Burke*, 334 U.S. 708 (1948—due process).

Price v. *Johnston*, 334 U.S. 266 (1948 — due process).

This is true of the sentence of a court-martial.

See *Wade* v. *Hunter*, 336 U.S. 684 (1949).

Schita v. *King*, 133 Fed. 2d 283 (1943).

United States ex rel Innes v. *Hiatt*, 141 Fed. Supp. 238 (Penn DC 1946).

See *Waite* v. *Overlaide*, 164 Fed. 2d 722 (CCA 7-1948).

See *Wrublewski* v. *McInery*, 166 2d 243 (CCA 9-1948).

See *Hicks* v. *Hiatt*, 64 Fed. Supp. 238 (Penn. DC 1946).

See *Shapiro* v. *United States*, 69 Fed. Supp. 205 (CT claims 1947).

In *Humphrey* v. *Smith*, 336 U.S. 695 (1949) this court stated:

> "It is contended that the court-martial was without jurisdiction to try respondent. If so the court-matrial exceeded its lawful authority and can be invalidated despite the limited powers of a court in habeas corpus proceedings."

DENIAL OF DUE PROCESS IN THIS COURT-MARTIAL

Due process of law is fundamental fairness in the conduct of a case. Due process is denied if the proceeding shocks the conscience of the court.

This case presents a most shocking instance of a travesty upon what a court-martial must be.

Fundamental defects include:

(1) "ACCUSED WAS COMMITTED ON THE THEORY THAT ALTHOUGH HE WAS ON DUTY AS A SENTRY AT THE TIME OF THE ALLEGED OFFENSE, IT WAS INCUMBENT UPON HIM TO RETREAT FROM HIS POST OF DUTY."

A civilian public officer need not "retreat to the wall." He need not retreat at all. He is justified in shooting when an attack is made in his presence. The body guard for Justice Field was released upon habeas corpus even before trial upon charge of homicide.

In re Neagle, 135 U.S. 1 (1889).

A military sentry, doing his duty, shooting at an escaping prisoner, killing a bystander, was justified and therefore was released on habeas corpus before trial in a civilian court.

United States v. *Lipsett*, 156 Fed. 65 (1907-DC Michigan).

The *Manual for Courts-Martial* (1928) states (page 163):

> "The general rule is that the acts of a subordinate officer or soldier, done in good faith and without malice in compliance with his supposed duty, or of superior orders, are justifiable, unless such acts are manifestly beyond the scope of his authority, and

such that a man of ordinary sense and understanding would know to be illegal. (Wharton on Homicide.)"

Even if the accused had not been a sentry, it was not encumbent upon him to retreat. The old "retreat to the wall" theory has been rejected in this court.

Beard v. *United States*, 158 U.S. 550, 564 (1895).
Rowe v. *United States*, 164 U.S. 546 (1896).
Brown v. *United States*, 296 U.S. 335 (1921—per Holmes, J.).

It shocks the sense of justice to see a case in which the two best defenses of the accused are not considered at all. Such a trial is not fairly conducted. Fundamental fairness has been grossly violated.

In *Bridges* v. *Wixon*, 326 U.S. 135, 156 (1945):

"the erroneous admission of evidence of such significance that without that evidence it was wholly speculative whether the finding against the prisoner would have been made, entitled the prisoner to release on habeas corpus."

See *Gibbs* v. *Burke*, 337 U.S. 773 (1949).

The Warden's brief, page 37, contends that the 1928 *Manual for Courts-Martial* overrules three decisions of the Supreme Court in regard to the obsolete doctrine of "retreat to the wall." Yet the review opinion in this very case undertook to cite civilian authority, choosing a nisi prius state case about a hundred years old in preference to three later decisions of the Supreme Court. It will also be noted that on the same page 163 of the Manual, the text authorities are twice cited. That would be superfluous if it did not mean that reference should be made to the authorities.

The failure to give the accused the benefit of these two applicable defenses was a denial of due process.

(2) "ACCUSED HAS BEEN CONVICTED OF MURDER ON EVIDENCE THAT DOES NOT MEASURE TO MALICE, PREMEDITATION OR DELIBERATION."

Kwock Jan Fat v. *White*, 253 U.S. 454 (1920):

"The decision must be after a hearing in good faith, however summary . . . and it must find adequate support in the evidence. *Zakonite* v. *Wolf*, 226 U.S. 272."

Interstate Commerce Commission v. *Louisville & Nashville R. R.*, 227 U.S. 88, 91 (1913):

"A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our government. . . . Such authority . . . comes under the Constitution's condemnation of all arbitrary exercise of power."

Vajtauer v. *Commissioner*, 273 U.S. 103 (1927):

"Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus."

(a) The incident occurred so quickly that Olschewski did not have time to tell whether there was any odor of alcohol on the breath of the accused. (R. II, 61.)

(b) Before the affair, accused did not have the pistol with a cartridge in the chamber, nor was it on his person. (R. II, 84, line 8, R. II, 78.)

(c) An argument preceded the shot, according to the German girl, a witness for the prosecution. (R. II, 68, lines 3-10, 17-20 and 38-41.)

(d) After the shot, accused rendered help to the wounded man at once, sending for a flashlight (R. II, 35) and helping carry him to the Polish barracks (R. II, 70).

Immediate aid to the injured is not characteristic of a murderer.

(e) A single shot alone was fired. (R. II, 35.)

(f) The two prosecution witnesses were in direct conflict on the one fact that occurred in the presence of both of them: whether an argument proceeded the firing of the shot.

(g) In regard to whether Olschewski or Kowalsczyk touched the German girl, she was not asked that particular question. The nearest approach to it was this:

"Q. What did they do when they came into the house?
A. They said 'Hello.'
Q. Then what happened?
A. And then Brown said they should go out.
Q. What did they do?
A. They turned around.
Q. Did they leave the house?
A. No, not immediately.
Q. What did Brown do then?
A. I don't recall.
Q. Was Brown standing up or sitting down?
A. He was standing up.
Q. How long was it before the Poles left the house?
A. About two minutes—it all happened so quick."

(h) There was no evidence to account for the bottle, what fingerprints were on it, or who brought it to the guard box. This absence of evidence without more left the prosecution's case in gravest doubt, far stronger than a reasonable doubt.

(3) THE LAW MEMBER.

A high degree of competence as an officer of the Field Artillery does not constitute sufficient qualification for the

equally specialized and equally difficult task of law member at a murder trial involving intricate points of law and criminal investigation.

The law member:

(1) Allowed the case to be considered without reference to the defense of the justification of a sentry;

(2) Permitted the obsolete and rejected theory of "retreat to the wall" to be invoked without question;

(3) Omitted consideration of provocation sufficient to reduce murder to manslaughter;

(4) Made no point of the failure to investigate the whiskey bottle, the weapon of the deceased;

(5) Failed to inquire adequately in regard to intoxication of the deceased;

(6) Failed to inquire adequately about provocation.

(7) Misunderstood the meaning of "leading question."

(8) Ruled strangely in regard to recalling a witness.

(9) See pages 27-8 of this brief.

4. "THERE WAS NO PRE-TRIAL INVESTIGATION WHATEVER UPON THE CHARGE OF MURDER."

The *Manual for Courts-Martial* (1949), Section 34(d), page 27, provides:

> "If as a result of an investigation a more serious or essentially different offense is charged, he should direct a new investigation to afford the accused an opportunity to exercise the privileges offered him by 35a and Article 46b with respect to the new or different matters alleged."

Section 35a of the Manual is extensive. It includes among other things the right to question adverse witnesses.

Brown's company commander, his battalion commander, his group commander and the investigating officer recommended trial upon a charge and specification of man-

slaughter. That was a recommendation that he should not be tried upon a charge of murder. The charge and specification of manslaughter were marked out at Headquarters, Continental Base Section, 100 miles away, without any explanation or further investigation. This procedure did not comply with military procedure. It did not give Brown a chance to question adverse witnesses upon the subject of malice or premeditation or provocation reducing murder to manslaughter. That was a denial of due process of military law.

(5) "THE RECORD SHOWS THAT COUNSEL APPOINTED TO DEFEND THE ACCUSED WAS INCOMPETENT, GAVE NO PREPARATION TO THE CASE, AND SUBMITTED ONLY A TOKEN DEFENSE."

A high degree of competence as an Infantry officer does not constitute sufficient qualification for the equally specialized and equally difficult task of defense counsel at a murder trial involving intricate points of law and criminal investigation. The ablest lawyer would bungle a major operation in surgery.

Article of War 17, Manual for Courts-Martial, provides:

> "The accused shall have the right to be represented before the Court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11."

From Paragraph 45b, *Manual for Courts-Martial* (1928):

> "An officer, or other military person, acting as individual counsel for the accused * * * will guard the interests of the accused by all honorable and legitimate means known to the law. * * *

"Before the trial he will explain to the accused the meaning and effect of a plea of guilty and his right to introduce evidence to such plea; his right to testify or to remain silent; his right to make a statement; his right to introduce evidence in extenuation; and, in an appropriate case, his right to plead the Statute of Limitations. These explanations will be regardless of the intentions of the accused as to testifying, making a statement or as to how he will plead.

"His preparation for trial shall include a consideration of the essential elements of each offense charged and of the pertinent rules of evidence, * * *

"Ample opportunity will be given him and the accused properly to prepare the defense including opportunities to interview each other and any other persons."

Due process requires that counsel be tendered in capital cases.

Carter v. *Illinois*, 329 U.S. 173, 174 (1946).
Powell v. *Alabama*, 287 U.S. 45, 71 (1932).

And in other criminal cases if circumstances indicate the need, as they did in this case:

Gibbs v. *Burke*, 337 U.S. 773 (1949).
Williams v. *Kaiser*, 323 U.S. 471 (1945).
Smith v. *O'Grady*, 312 U.S. 329 (1942).
Wade v. *Mayo*, 334 U.S. 672 (1948).
Hawk v. *Olsen*, 326 U.S. 271 (1945).
Townsend v. *Burke*, 334 U.S. 736 (1948).
See *Rice* v. *Olson*, 324 U.S. 786 (1945).
"*The Right of Counsel Today*," 43 Ill. Law Rev. 664-667. (November-December 1948.)

"*The Right of an Accused to the Assistance of Counsel.*" John R. Snively, 32 Journal of the American Judicature Society 111-114. (December 1948.)

Representation by counsel means effective representation.

Edwards v. *State*, 204 Ga. 384, 50 SE 2d 10 (1948).

Hawk v. *Olsen*, 326 U.S. 271 (1945).

Schita v. *King*, 133 Fed. 2d 283 (CCA 8-1943). Cert. Den. 322 U.S. 761.

McDonald v. *Hudspeth*, 41 Fed. Supp. 182 (D. C. Kan. 1941).

Powell v. *Alabama*, 287 U.S. 45 (1932).

Shapiro v. *U.S.* 69 Fed. Supp. 205 (Claims 1947).

Von Moltke v. *Gillies*, 322 U.S. 708 (1948).

See *Townsend* v. *Burke*, 334 U.S. 736, decided June 14, 1948.

See *Klapprott* v. *U.S.*, 335 U.S. 601, 336 U.S. 942 (1949).

Counsel in this court-martial trial:

(1) Failed to confer about the facts and law of case with the accused until 15 minutes before the trial began, though he had an earlier opportunity (R. 43).

(2) He failed to present any defense except self-defense, omitting (a) the defense of the duty of a military sentry, *U.S.* v. *Lipsett*, 156 Fed. 65 (1907), (b) the provocation of the insult to the German girl, (c) the justification of a public officer set forth in the case of *In re Neagle*, 135 U.S. 1 (1889) MCM 1928, page 163, (d) the departure from the old "retreat to the wall" theory by the more recent cases of

Brown v. *U.S.*, 296 U.S. 335 (1921), *Beard* v. *U.S.*, 158 U.S. 550, 564 (1895), and *Rowe* v. *U.S.*, 164 U.S. 546 (1896), (e) the significance of the original statement of the remark of Sergeant Olschewski, "Boy is O.K." (R. II, 34), (f) the fact that the autopsy report confirmed the testimony of the accused, proving that the deceased was lunging forward when shot (R. II, 36), (g) mention of the fingerprints upon the bottle, which should have been investigated on the question of whether the deceased was swinging at Brown, (h) mention of the reputation of Sergeant Olschewski in regard to veracity, (i) mention of whether Sergeant Olschewski or the deceased had been drinking, (j) mention of the powder burns upon the uniform of the deceased, (k) mention of whether the Polish guards, especially these two, were violent, quarrelsome and hard to get along with, (l) mention of whether the German girl was molested by the deceased, (m) mention of whether she saw a blow struck upon the face of the accused, (n) mention of whether the military or German police had any information, (o) objection to the pretrial fatal defects and other irregularities, (p) mention of the source of the bottle (R. 48, 49).

(3) Defense counsel argued the case for about 5 minutes. This was a trial upon a charge of murder (R. 48, 49).

(4) Defense counsel consented to a stipulation in regard to the gunshot wound that, coupled with the uncontradictory testimony of Pfc. Oaks, that the bullet entered the right shoulder on the back side, was substantially less favorable to the accused than the autopsy report (R. II 76, 36).

(5) Apparently was not a lawyer. If it is held or

believed that defense was a lawyer, the result should be the same. The harm to the accused is just as great.

(6) His questioning of witnesses was quite inadequate (R. II 62, 67-68, 79, 87).

(7) He failed to present available evidence that Brown gave immediate aid to the wounded man (R. II 35).

6. "THE APPELLATE REVIEWS BY THE ARMY REVIEWING AUTHORITIES REVEAL A TOTAL MISCONCEPTION OF THE APPLICABLE LAW."

The review by the Staff Judge Advocate was adopted by the Board of Review and approved by the Judge Advocate General without comment.

The review failed to comment upon the defense of the duty of a sentry acting in good faith to carry out his responsibilities. It supported the result of the trial upon a discredited doctrine now obsolete and rejected in federal criminal law, the doctrine of "retreat to the wall." It failed to observe that there was no evidence whatever of malice or premeditation. It failed to comment upon the effect of provocation of a degree not sufficient to justify an act and yet enough to reduce the severity of the crime from murder to manslaughter.

If the Staff Judge Advocate had access to the Report of Pretrial Investigation, his review was particularly subject to objection in that it failed to notice the significant res gestae remark, "Boy is O.K.," in which Sergeant Olschewski apologized for the misconduct of the deceased (R. II 34).

When the reviews went so wide to the mark, the

analogy of *Bridges* v. *Wixon*, 326 U.S. 135 (1945) applies.

The reviewing authorities serve the function of prosecuting attorney, defense counsel and court. No brief or argument is submitted in behalf of either side. The responsibility upon the reviewing authorities is very great.

At the argument in the District Court, counsel for the Warden contended that at the court-martial the accused testified that he shot in self-defense, and therefore could not claim that he acted as a sentry performing his guard duties. That same theory seems to pervade the opinions of the reviewing authorities.

Many a time a soldier or officer of the law is placed in a position of imminent danger where the correct thing for him to do in performing his duties is precisely the same that he would do in defending himself. It is in fact his duty to defend himself, protect his post and preserve order.

Later, upon the witness stand, when confronted with a question, he may say that he acted in self-defense. That does not negative the fact that he was at the same instant and by the same act carrying out his duties as a soldier or officer of the law. Surely he is not to be deprived of the protection to which a soldier or officer of the law is entitled by law merely because he through honest mistake or haste does not present a complete self-analysis upon the witness stand. The prosecution and the reviewing authorities in taking their extreme position have gone off on a tangent. They have been unduly severe without sound reason. They cannot expect a witness to submit a complete panorama of his mind in reply to each rapid-fire question at the trial.

When several of the principal defenses are not noticed, there has been almost a total failure of counsel for the defense on review. Also there has been a total misconception of the case from a judicial viewpoint. Due process is surely lacking.

7. PRETRIAL INVESTIGATION A TRAVESTY.

(a) Decisive error in evaluating autopsy report. See statement of facts in this brief, *ante*.

(b) Decisive error in quoting "Boy is O.K." when Olschewski's statement was translated. *Ante*, page 8.

(c) Bottle not examined for fingerprints of deceased. Brown called this bottle to the attention of the investigator (R. II 35; R. 81, 82, 83, 84).

(d) The source of the bottle and who brought it to the guard box were not investigated.

(e) Whether the Polish guards had been drinking that Christmas day or evening was not investigated. It had a bearing on the events, the probabilities of occurrences, and the accuracy of Sgt. Olschewski as a witness (R. II 30-36).

(f) Veracity of Sgt. Olschewski, chief witness of prosecution, was not investigated (R. II 30-36).

See *Hicks* v. *Hiatt*, 64 Fed. Supp. 238 (1946).

An American, on guard duty alone in an enemy country at night in the presence of aliens, is entitled at least to have the veracity of the sole significant witness against him subjected to thorough examination.

(g) Whether Sgt. Olschewski and Private Kowalsczyk were violent or quarrelsome was not investigated. The solitary American on duty in the presence of aliens in an enemy country is entitled as a matter

of right to this precaution. He has not had the protection which military law is designed to afford.

(h) Autopsy did not include a test of the intoxication of the deceased. (R. II 36).

(i) Autopsy did not include examination of clothing of deceased for powder burns which would have confirmed Brown's statement of altercation at close quarters. (R. II 36).

(j) Several witnesses who came immediately to the scene were not questioned.

(k) German police, who are the first to interview Miss Rehm (R. II 62, 67), were not questioned.

(l) Military police who first took custody of Brown and to whom Olschewski first talked were not questioned (R. II 35) (80).

(m) There was no inquiry of Oaks why he said the soldier had been drinking, which soldier he meant. The deceased was a private, a soldier off duty Christmas night. Brown was a non-commissioned officer under whom Oaks was then serving. He must have referred to the deceased. If he referred to Brown, did he get the impression merely because Brown had picked up the empty whiskey bottle? Or was Brown dazed and mumbling at the sudden shock of having inflicted a wound?

(n) The investigation was conducted exclusively for the benefit of the prosecution.

(o) All interviews shockingly superficial. A "once-over lightly" in a capital felony charge.

(p) The Investigating Officer interviewed only Brown. The others he rubber-stamped. Who took the original statements does not appear from the record.

A rubber-stamp investigation is not due process of the law. In this case, it was demonstrably injurious and highly prejudicial.

URGENCY OF THOROUGH AND IMPARTIAL PRE-TRIAL INVESTIGATION

In a military establishment, no investigation can be conducted without permission from the commanding officer. Discipline would be subverted by unofficial investigations. In 1947 defense counsel was not appointed until the case was referred to a general court-martial for trial. The accused was in the custody of Military Police. From behind the bars he could not conduct any investigation.

Military justice follows the continental practice. There, the prosecuting attorney customarily makes his investigating file available to defense counsel in advance of trial. That system is the opposite of "trial by surprise." Court-martial is continental in name and in substance.

Humphrey v. *Smith*, 336 U.S. 695 (1949), did not foreclose the question of due process.

Due process in military law requires a thorough and impartial pretrial investigation. Without it, a court-martial is in grave danger of being like a house built upon the sands.

In addition to the highly prejudicial and indeed decisive failures of the pretrial investigation, set forth above on pages 45 to 47 of this brief, the following occurred:

(8) FAILURE TO ACCORD TO THE ACCUSED THE RIGHT TO CROSS-EXAMINE THE WITNESSES AGAINST HIM DURING THE PRETRIAL INVESTIGATION.

This right was conferred by the 70th Article of War as it was in 1947, this provision now being in the 46th. This

right was not accorded to the accused. (R. 41.) Failure to tell him of his right was a defect of jurisdiction and a denial of due process of law.

Johnson v. *Zerbst*, 304 U.S. 458 (1938).

Recitals in the Report of Pretrial Investigation that he was accorded this right may be rebutted by proof.

Anthony v. *Hunter*, 71 Fed. Supp. 823 (D.C. Kansas 1947).

Von Moltke v. *Gillies*, 322 U.S. 708 (1948).

Haley v. *State*, 332 U.S. 596 (1948).

Marino v. *Ragen*, 332 U.S. 561, 564 (1947).

And again, after the charge was changed to murder, no opportunity was given to Brown to examine the witnesses. He could well have questioned them in regard to provocation or malice.

IV

THE REQUIREMENT OF COUNSEL FOR THE DEFENSE WAS NOT SUBSTANTIALLY COMPLIED WITH

(This point has been discussed under "due process." It also arises as an independent constitutional ground under the Sixth Amendment.)

V

CONVICTION FOR MURDER REQUIRES A THREE-FOURTHS VOTE

(43d Article of War, 10 USCA 1514.)

"Death Sentence; when lawful. No person shall, by general court-martial, be convicted of an offense for which death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these

articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote. (June 4, 1920, c. 227, sub-chapter II, § 1, 41 Stat. 795)"

This was a reform measure adopted in 1920.

The minimum sentence for murder is life imprisonment. When there is a conviction for murder, it automatically carries a life sentence unless by unanimous vote the death penalty is imposed. Since a life sentence follows automatically as the minimum punishment for murder, a three-fourths vote is required. This is true because it is provided, "nor sentence to suffer life imprisonment, not to confinement for more than ten years, except by the concurrence of three-fourths. . . ."

Otherwise, if in case of a conviction for murder there were a mere two-thirds vote upon the issue of guilt, followed by a three-fourths vote to impose a life sentence, that second vote would be an empty gesture. Already the accused has been doomed at least to life imprisonment, if he is once legally convicted of murder.

This is an entirely different question of law from that presented in *Stout* v. *Hancock*, 146 Fed. 2d 741 (CCA 4-1944), in which it was contended that unanimous vote was necessary to convict for rape. Since the death penalty was not mandatory, it was held that there was no requirement of a unanimous vote.

In *Stout* v. *Hancock*, there was a three-fourths vote recorded. For rape or murder the minimum punishment is life imprisonment.

It is true that the statute is peculiarly drawn. The true intention of Congress, however, is to require a three-fourths vote in any case where sentence of life imprisonment is a mandatory minimum.

This point is available in this count.

United States v. *American Express Co.*, 265 U.S. 425 (1924).

Cochran v. *M & M Transportation Co.*, 110 Fed. 2d 519.

See *Ross* v. *Commissioner*, 169 Fed. 2d 483, 492 note.

LeTulle v. *Schofield*, 308 U.S. 415 (1940).

What happened to Brown could happen to any other American absolutely innocent in his intentions, doing his duty as he sees it. Until his release by habeas corpus, he was a FORGOTTEN MAN. This is a strong, clear case for habeas corpus. There is no jurisdiction to disturb the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter G. Cooper, certify that the foregoing brief has been served upon petitioner by mailing five copies in an envelope, duly stamped, sealed and addressed to Honorable Philip B. Perlman, the Solicitor General, Department of Justice, Washington, District of Columbia, and by mailing one copy each to Francis X. Walker, Esquire, Acting Assistant Attorney General, Stanley M. Silverberg, Esquire, Special Assistant to the Attorney General, Robert S. Erdahl, Esquire, and Israel Convisser, Esquire, all at the Department of Justice, and that this mailing occurred on this the ..... day of January, 1950.

Attorney for Eugene Preston Brown

APPENDIX

"Title 10 U.S.C.A. § 1542. 'Charges; action upon (article 70) Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

"No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

"Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

"When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon

which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him." As amended Aug. 20, 1937, c. 716, §2, 50 Stat. 724.